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No. 85-750

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JACK ROSE, ETC., *et al.*,
Petitioners,

v.

LINDA LITTLEJOHN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF RESPONDENT IN OPPOSITION

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For the reasons stated herein, petitioners' request for a writ of certiorari should be denied.

STATEMENT OF THE CASE

Respondent Linda Littlejohn was employed during the 1980-81 and 1981-82 school years as a non-tenured fifth-grade teacher in the Calloway County, Kentucky School District. Littlejohn and her husband separated in May 1982 and were divorced in July of that year. While Littlejohn's divorce was pending, the Calloway County school system determined not to renew her teaching contract for the 1982-83 school year. Littlejohn brought suit, claiming that this failure to renew her contract was

unconstitutionally predicated on the dissolution of her marriage.

At the conclusion of plaintiff's case, the district court granted defendants' motion for a directed verdict. The court acknowledged that "[t]here was evidence at the trial that the reason given by defendant for plaintiff's nonrenewal was the fact she was involved in the dissolution of her marriage." Petition App. at 55. Recognizing that matters relating to the marital relationship are entitled to special constitutional protection, the court observed that "[w]ere this an instance in which plaintiff had been *discharged* from her employment by reason of her domestic difficulties, [it] would have *no hesitancy* in holding that plaintiff had articulated a justiciable claim." Pet. App. at 56-7 (emphasis added). Since Littlejohn was not discharged during the term of her 1981-82 school year contract (this one-year employment contract, rather, was *not renewed* after it had expired), the court concluded that there were no "fundamental rights involved" in this case. Pet. App. at 57. And because "[p]laintiff cannot establish any fundamental right to *employment* by the Board," (R 27, p. 3) (emphasis added),[1] the court held that she did not articulate a viable claim.[2]

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[1] The version of the district court's opinion that appears in the Petition Appendix is incomplete at page 57, line 7, in that it omits the language quoted above; specifically, it states: "Plaintiff cannot establish any fundamental right, this court concludes that plaintiff had failed to sustain her burden (sic)." The full line should read:

> Plaintiff cannot establish any fundamental right to employment by the Board, and, absent this right, this Court concludes that plaintiff has failed to sustain her burden.

R 27, p. 3.

[2] As a second, alternative reason that it said alone would justify dismissal of the case, the district court ruled that even assuming Littlejohn stated a viable constitutional claim, defendant Rose, the superintendent, was entitled to qualified immunity. Pet. App. at 61.

The Sixth Circuit reversed. It held that a right to employment is not a prerequisite to a claim that the state unconstitutionally denied employment because of an employee's involvement in protected activity—here, the dissolution of a marriage.[3]

ARGUMENT

This Court has clearly established the principles that are necessary to resolve this case, and the Sixth Circuit correctly applied those principles in reversing the judgment of the district court. This case poses no special considerations warranting plenary review by this Court.

This Court has "routinely categorized [matters relating to marital and family relationships] as among the personal decisions protected by the right to privacy [and, in addition], 'has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.'" *Zablocki v. Redhail*, 434 U.S. 374, 384-85 (1978), citing *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-40 (1974). The Court has made clear that the protection accorded to mat-

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[3] In addition, although insufficiency of the evidence was not the basis for the directed verdict, the Sixth Circuit held that the evidence was sufficient to permit a jury to conclude that Littlejohn's involvement in divorce proceedings was the motivating factor in the superintendent's refusal to recommend her for rehire.

With respect to the immunity issue, *see* note 2, *supra*, the court held that the dismissal of the case on the basis of the qualified immunity defense asserted by the superintendent was erroneous.

Petitioners assert in their second "Question Presented" that the court of appeals should have affirmed the district court's dismissal of Littlejohn's claim against the superintendent, in his individual capacity. But the district court's judgment dismissed Littlejohn's case in its entirety, not simply her claim against the superintendent in his individual capacity, and the Sixth Circuit correctly reversed this judgment. In any event, petitioners fail to offer any reason why such an issue is worthy of review, and we see none.

ters relating to the marital relationship extends to the "adjustment of [that] fundamental human relationship," *Boddie v. Connecticut*, 401 U.S. 371 (1971), given the " 'associational interests that surround the establishment and *dissolution* of that relationship,' " *Zablocki*, *supra* at 385-86 n.10, citing *U.S. v. Kras*, 409 U.S. 434, 444 (1973) (emphasis added).[4]

Further, this Court has "uniformly rejected' the theory that a government benefit, such as public employment, to which employees have no contractual right, may be denied

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[4] Petitioners suggest, notwithstanding these pronouncements, that the dissolution of marriage somehow is not within the sphere of constitutionally protected privacy or liberty interests. Petitioners misconceive the nature of the privacy and liberty interest at issue here. This Court has made clear that the right "to enter into and maintain certain intimate human relationships," such as marriage, is an aspect of the "freedom of association." *Roberts v. United States Jaycees*, 104 S.Ct. 3244, 3249 (1984). And the "[f]reedom of association . . . plainly presupposes a freedom not to associate." *Roberts, supra*, 104 S.Ct. at 3252. Consistent with this principle, as this Court has recognized, the constitutional protection accorded the marital relationship must extend to the dissolution of marriage as well as to the creation of marriage in order to ensure that marriage remains a consensual association, rather than a union that is the product of state compulsion.

Petitioners also state that "[n]ot being rehired by the Board . . . because of her being a divorced person, can hardly be said to infringe upon personal privacy . . . particularly when considered in light of her simply [not] being rehired in one job and remaining as free as before to seek another" Pet. at 15. They appear by this statement to confuse the privacy/liberty interest at stake here with the separate liberty interest that may be implicated by governmental action defaming a person in the course of declining to rehire him. *See, e.g., Paul v. Davis*, 424 U.S. 693, 710 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972). The latter liberty interest—which requires only that the government afford *procedural* safeguards before taking action on the basis of disparaging or stigmatizing charges, *id.*—is not at issue here. This case involves the denial of employment for a reason that is constitutionally impermissible. Thus, even assuming Littlejohn remained free to seek another job, this is not relevant to the merits of her claim.

for reasons that infringe upon constitutionally protected activity. *Keyishian v. Board of Regents*, 385 U.S. 589, 605 (1967). As the Court observed in 1972, its decisions

> [f]or at least a quarter-century [have] made . . . clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes a constitutionally protected interest. . . . For if the government could deny a benefit to a person because of his constitutionally protected [activities] his exercise of those freedoms would in effect be penalized. . . . This would allow the government to 'produce a result which it could not command directly' . . . . Such interference with constitutional rights is impermissible.

Perry v. Sindermann, 408 U.S. 593, 597 (1972) (citation omitted). The principle that a benefit cannot be denied because of a person's involvement in constitutionally protected activity has been applied "most often . . . to denials of public employment . . . regardless of the public employee's contractual or other claim to a job." *Id.* (citations omitted).

Littlejohn's claim falls squarely within the principles set forth above. She stated and substantiated her claim that she was denied employment on a constitutionally impermissible basis—because of her involvement in the dissolution of her marital relationship.[5] The District Court's dismissal of her claim based on the lack of a fundamental

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[5] Because this case involves the marital relationship, to which this Court already has accorded special constitutional protection, the resolution of *Bowers v. Hardwick*, 85-140, now pending before this Court, should not affect the outcome here. *Bowers* concerns the extension of this Court's privacy decisions to relationships or conduct (homosexual activity) that has not been expressly accorded protection under such decisions.

right to *employment* was therefore erroneous, and the Sixth Circuit's reversal was entirely correct.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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